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In the Supreme Court of the United States

October Term 1974

No. 74-1527

RICHARD J. GOLDINGER, *Petitioner*

v.

BORON OIL COMPANY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the
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RICHARD J. GOLDINGER, *Petitioner*

v.

BORON OIL COMPANY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

As set forth in the Petition for Writ of Certiorari, this case involves petitioner's claims that respondent, Boron Oil Company, by reason of its relationship with petitioner violated anti-trust laws. The case was originally decided by the District Court on cross motions for summary judgment pursuant to Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE. The record before the District Court consisted of the pleadings, answers to interrogatories and documents produced in connection therewith, and transcripts of the depositions of plaintiff, Richard Goldinger, and defendant's Pittsburgh Division Sales Manager, Robert H. Hughes. Plaintiff and defendant represented to the court and the court found (A. p. 2a)* that as to the causes of action pleaded there was no issue of any material fact.

*Respondent herein has adopted the method employed by petitioner of referring to the Appendix filed with the Court of Appeals as (App. p.) and to the Appendix to the Petition as (A. p.).

While the District Court granted summary judgment in favor of defendant as to all three counts of plaintiff's Complaint, plaintiff's appeal to the Circuit Court involved only Count I. Plaintiff alleged in his Complaint that Count I "arises under the Anti-Trust laws of the United States, in particular, the SHERMAN ANTI-TRUST ACT, #1, 15 U.S.C. §1 and the CLAYTON ACT §§3 and 4, 15 U.S.C. §14 and 15." Plaintiff's Complaint contained no averment that defendant made any lease or sale to plaintiff. Defendant's answer denied that it had violated the SHERMAN or CLAYTON Acts.

Under the Commission Manager Agreements reproduced in Appendix C to plaintiff's Petition before this Court, plaintiff was employed by defendant to manage its retail gasoline station located at Route 8 and Duncan Avenue, Allison Park, Pennsylvania. Under paragraph 5A of such agreements with defendant, plaintiff was required to follow and comply with the operating practices, instructions, rules and regulations prescribed by defendant and to devote his full business time to operation of the station. Plaintiff testified in deposition that defendant exercised its rights under paragraph 5A of the agreements. (See transcript, deposition of Richard Goldinger, pp. 25-27). Plaintiff was visited weekly by his supervisor (Goldinger deposition, transcript p. 26) and was required to submit daily reports to defendant on defendant's forms (App. p. 9). In the words of plaintiff himself: "It's unbelievable the reports and things they [Boron] required." (App. p. 62a) Judge Weber summarized the evidence regarding defendant's control of plaintiff by stating "that much responsibility was imposed upon the manager in the conduct of his station, but that he was closely and extensively supervised by the defendant in almost every aspect of his performance of these duties." (A. p. 14a) The District Court thus found, and the record supports the finding, that plaintiff was not an "independent businessman" or dealer.

Plaintiff's arguments are centered around the obligations imposed upon him by defendant. All such duties involved matters that were directly under the control of plaintiff and could not practically be controlled by defendant short of hiring another manager to manage plaintiff.

Plaintiff was responsible for making wage disbursements to other Boron employees working at the station out of amounts which he was authorized to withhold from his gross commission. In plaintiff's case, this amounted to one full-time employee and several part-time employees. Plaintiff was not responsible for all utilities at the station as suggested on page 6 of plaintiff's Petition. Defendant subsequent to May 1, 1969 paid for such utilities and between August 8, 1966 (the date of plaintiff's employment) and May 1, 1969 defendant paid for electricity consumed at the station. Plaintiff was not responsible for insuring the station or inventory, but was responsible only for the cost of garage keeper's liability insurance.

Plaintiff paid no rent for the station and was not responsible for repairing or maintaining the station. Except for small hand tools, defendant supplied the station, all equipment necessary to operate the station and the station inventory at no charge to plaintiff. In his Petition, plaintiff erroneously asserts that he was responsible for the "working capital" of the station. Defendant furnished all of the station inventory of gasoline, tires, batteries and accessories which constituted the largest ongoing expense of operating the station. Furthermore, plaintiff was allowed to retain from his required daily remittances to Boron a large percentage of his commission earned at the station. The District Court found that:

> "The commissions were paid on all sales during a given month on the 25th day of the succeeding month.

> Plaintiff remitted the proceeds of sales of defendant's products to defendant at the close of each day's business, but was allowed to retain two cents for every gallon of gasoline sale, to apply against the full commission of 4.6 and 5.16 cents per gallon on regular and premium gasoline respectively." (A. p. 11a)

Thus, plaintiff was not responsible for providing the working capital necessary to operate the station from his own funds.

The District Court was very careful in its opinion to recognize that the question of whether an individual is an employee in the context of anti-trust proceedings may be answered differently than would be the case in a tort or some other type of proceeding. It is undisputed that defendant unilaterally set the price of gasoline sold at the station managed by plaintiff. But it is also undisputed that defendant alone bore the economic impact and risk of such price changes, since plaintiff was paid a fixed cents per gallon commission irrespective of the selling price or cost of gasoline. Plaintiff testified at deposition as follows:

> Q: So, I take it then, Mr. Goldinger, no matter what the price at which you sold Boron gasoline, you would have made a profit under your arrangement with them?
>
> A: Right. (App. p. 194a)

The District Court summarized the evidence with respect to plaintiff's commissions as follows:

> "The plaintiff's only risk from price competition was that he might suffer diminution in the quantity of gasoline sold from his station and hence a lessening of his fixed gallon commission, but the ordinary risk of the market was not placed upon him." (A. p. 15a)

The District Court also emphasized in its opinion that plaintiff was free to quit his employment at any time, and unlike a dealer was not obligated to continue to occupy the station by reason of a lease. The Court of Appeals for the Third Circuit affirmed the decision of the District Court in a per curiam opinion with a reference to Judge Weber's opinion.

ARGUMENT

PLAINTIFF'S PETITION FOR CERTIORARI VIRTUALLY IGNORES THE LEGAL ISSUES PRESENT IN THIS CASE. THE ONLY DECISION RELIED UPON BY PETITIONER IS *SIMPSON V. UNION OIL CO.*, 377 U.S. 13 (1964). AS THE DISTRICT AND CIRCUIT COURTS BELOW RECOGNIZED THE INSTANT CASE IS BASICALLY DIFFERENT FROM *SIMPSON*. THE PLAINTIFF IN *SIMPSON* WAS A DEALER, AND HIS INDEPENDENCE WAS NEVER AT ISSUE. THE PLAINTIFF IN THE PRESENT CASE WAS NOT A DEALER, BUT INSTEAD MANAGED A COMPANY STATION. THE RATIONALE OF THE COURT'S DECISION IN *SIMPSON* IS THAT OTHERWISE INDEPENDENT DEALERS CANNOT, THROUGH CONSIGNMENT SALES AGREEMENTS, BE DEPRIVED OF THE RIGHT TO SET THEIR OWN PRICES. THE PRESENT PLAINTIFF WAS NOT OTHERWISE INDEPENDENT, AND THE RATIONALE FOR THIS COURT'S OPINION IN *SIMPSON* DOES NOT EXIST IN THE PETITIONER'S CASE.

1. There can be no illegal tie-in sale in violation of Section 3 of the Clayton Act where there is no averment in the Complaint or proof in the record of any sale or lease of goods.

The District Court's opinion with respect to Count I of plaintiff's Complaint first discusses the allegations of a violation of Section 3 of the Clayton Act. The District Court found "no allegation in the Complaint that plaintiff purchased or was required to purchase or lease any product or property from the defendant. There is nothing in the evidentiary material including plaintiff's own deposition to show that he ever purchased or was required to purchase any product from the defendant except that plaintiff did

purchase soap and towels for his gasoline station restrooms (not for resale), which he was under no obligation to purchase from defendant." (A. p.5a) Plaintiff, nevertheless, contends on page 13 of his Petition that "[t]he prohibition in the Commission Manager Agreement against selling competitive products plainly constitutes 'a contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not . . . deal in the goods . . . . of a competitor . . . ' ".

One of the most frequently cited decisions involving tying arrangements is *Northern Pacific R.R. Co. v. U.S.*, 356 U.S. 1, 5-6 (1958), wherein Justice Black defined a tying arrangement as follows:

> "For our purposes a tying arrangement may be defined as an agreement by a party to *sell* one product but only on the condition that the *buyer* also *purchases* a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." (Emphasis supplied)

Cases with similar holdings are legion. See *Hunter Douglas Corp. v. Lando Products, Inc.*, 215 F.2d 372 (9th Cir. 1954); *Allied Equipment Co. v. Weber Engineered Products, Inc.*, 237 F.2d 879 (4th Cir. 1956); *Times-Picayune v. U.S.*, 345 U.S. 594 (1953).

Plaintiff's Petition seeks to overcome the overwhelming weight of the above authorities by contending that plaintiff took dominion over Boron's products and bore the risk of loss. Plaintiff's argument, however, finds no support in the facts of the controversy. Plaintiff at no time had any meaningful control over Boron's products. Unlike the distributors and independent dealers in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), plaintiff was conducting business under defendant's name, in defendant's retail establishment and using defendant's equipment.

Plaintiff was closely supervised by defendant and was required to report daily to his employer. Defendant determined what would be stocked at the station and the prices at which such stocked products would be sold. Plaintiff's risk of loss, moreover, was limited to causes under his direct control, and then only to the extent such losses exceeded shortage allowances. (See A. p. 37a)

The District Court found that:

> "From all of the evidentiary materials presented we can find no basis for a finding that the contract between plaintiff bore any of the attributes of an illegal tying arrangement under Sec. 3 of the Clayton Act or Sec. 1 of the Sherman Act. There is no evidence which would cause the court on looking behind the form and language of the agreement to conclude that despite the appearance of a contract of employment the agreement's actual effect was that of a tying agreement." (A. pp. 7a-8a)

Respondent submits that the courts below correctly applied the law with respect to plaintiff's allegations that defendant had violated Section 3 of the CLAYTON ACT, and there exists no reason for this Honorable Court to grant the Petition.

2. The fact that an employee is paid on a commission basis and is required to bear certain expenses under his control does not as a matter of law render him an independent contractor for antitrust purposes where his employer closely controls his manner and method of work and the employer bears the major risks of the market place.

Plaintiff has not seriously questioned the well established (and utterly necessary) principal that a corporation cannot illegally conspire with its employees to violate the SHERMAN ACT upon which the District Court based its

opinion. See *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir., 1952); *Kendall Elevator Co. v. LBC&W Assoc. of S. Carolina*, 350 F. Supp. 75 (D.C.S.C. 1972); *Allen Organ Co. v. North American Rockwell Corp.*, 363 F. Supp. 1117 (E.D. Pa. 1973).

Although plaintiff suggests that the lower courts misrelied on the above authorities, plaintiff does not dispute the settled law defining the relationship of employer-employee. In the words of the Supreme Court of Pennsylvania in *Feller v. New Amsterdam Casualty Co.*, 363 Pa. 483, 486, 70 A.2d 299, 300 (1950):

> "The legal distinction between an employee and an independent contractor is so well established as to require little if any discussion. The characteristic of the former relationship is that the master not only controls the result of the work but has the right to direct the way in which it shall be done, whereas the characteristic of the latter is that the person engaged in the work has the exclusive control of the manner of performing it, being responsible only for the result."

Plaintiff in the present case did not have "exclusive control" of the manner in which he performed his services in operating Boron's station. Defendant had the right to and did "direct the way" in which he performed his work.

Paragraph 5A of both the 1966 and 1969 Agreements provided that:

> "Manager will devote his full business time to the operation of the station and will follow and comply with the operating practices, instructions, rules and regulations prescribed by Boron."

Unlike a dealer, petitioner was not free to pursue outside business interests and did not. Unlike the plaintiff in *Simpson*, supra, plaintiff was not free to decide what products would be sold at the station, and at what prices they

would be sold. Unlike Mr. Simpson, Richard Goldinger did not have the right to refuse to deal with Boron (see 377 U.S. at 16), could be discharged at any time by his employer, and could quit at any time. Defendant, moreover, decided what days and hours the station was to be open and what promotions would be given at the station. An independent businessman or dealer would make such decisions for himself. The fact that plaintiff did not and could not make such decisions is the threshold factor that distinguishes plaintiff's case from *Simpson*.

Unlike the situation in *Simpson*, defendant did not impose a "device" for establishing retail prices of its products on an otherwise independent businessman. Under defendant's contracts with plaintiff, defendant assumed all of the major costs of operating its station and actually supervised and controlled all aspects of the day-to-day work of its employee manager.

Plaintiff's counsel has taken the position that despite the lack of independence exercised by plaintiff, the fact that plaintiff was paid on the basis of a net commission computed after defendant deducted the costs attributable to trading stamps, employee wages, and liability insurance from the gross amount of the commission brings this case within the ambit of *Simpson*. The Court of Appeals for the Tenth Circuit in the case of *American Oil Co. v. McMullin*, 508 F.2d 1345 (10th Cir. 1975), considered similar arguments made by an employee and made the following observation:

> "That McMullin in his capacity as employee assumed some of the overhead and received compensation in the form of commission rather than salary does not make his status as an employee a sham. We find nothing in *Simpson* which would prohibit a manufacturer from distributing its own products and thereby controlling wholesale distribution prices. *Simpson v. Union Oil*

> *Co.*, 377 U.S. 13, 84 S. Ct. 1051, 12 2. Ed. 2d 98, merely established the boundaries of the General Electric holding; it did not overrule it." (508 F.2d at 1352)

The same argument was made in *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). In *Gray* the Circuit Court affirmed a directed verdict in favor of defendant granted on the basis that plaintiff was an employee and that he failed to prove any injury or damages. A review of the Petition for Writ of Certiorari filed by Gray in this Honorable Court at No. 72-1305, October Term, 1972 reveals that Mr. Gray's case was considerably stronger than plaintiff's in that Gray was required to purchase for his own account from Shell TBA in such quantities as Shell deemed appropriate and was compensated on the basis of a commission based on the difference between retail prices and "tank wagon" prices, both of which were set by Shell. (See pp. 31-33 of Petition for Writ of Cert. at No. 72-1305, October Term, 1972). Despite such fact situation, the District Court in *Gray* granted defendant a directed verdict.

The Petition filed by plaintiff states at page 12 that the "district court in the present case erred by giving weight to the minor differences in drafting between Boron's Commission Manager Plan and Union Oil Company's consignment plan." Petitioner would have this Court ignore the investment made by defendant in the station itself, the equipment furnished by defendant to operate the station and the entire station inventory, all of which were provided by defendant at no charge to plaintiff and at defendant's sole risk. As previously noted, even if plaintiff made no sales, he would not incur losses at the station, although defendant's massive investment in such event would earn nothing and defendant would continue to incur loss for items such as real estate taxes and other fixed overhead items. Thus, the situation is quite distinct from the situation in *Simpson* and not merely a difference in drafting.

On pages 12 and 13 of his Petition, plaintiff interjects an argument that was not presented to the District Court. The contention is now raised that because defendant required plaintiff to pay for and give trading stamps, defendant was in "effect tampering with the price structure for products sold through all Boron outlets." Since pursuant to the express provisions of the Commission Manager Agreement, defendant unilaterally established the retail price of its products sold at the station, plaintiff's argument that the trading stamp requirement affected the retail price of these products is difficult to comprehend. Again, plaintiff has cited "dealer" cases in support of his argument without recognizing the basic differences between Mr. Goldinger and a dealer. If a dealer who sets his own prices is required to give or refrain from giving trading stamps, such requirement would be bound to affect the prices he sets. But where the retail price is established by the oil company, however, the requirement that its employee must give trading stamps bears no more relationship to the price of gasoline at the station than the requirement that he keep the restrooms clean. *U.S. v. Socony-Vacuum Oil Company*, 310 U.S. 150 (1940), and *U.S. v. Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961) are simply not applicable to the facts in this case.

Plaintiff's real complaint in this case seems to be that he wanted to be able to set the price at which gasoline could be sold. Plaintiff received a fixed cents per gallon commission and it is easy to see why it would be beneficial to him to sell at the lowest conceivable price. He would have received the same commission, for example, on a gallon of gasoline sold for $.10 as $.30 and certainly would have sold almost unlimited quantities of gasoline at the lower figure. Defendant urges this Honorable Court to consider plaintiff's claims in the same context as that presented to the Tenth Circuit in *American Oil Co. v. McMullin;* supra:

> "In studying McMullin's complaints and the record made below, we are convinced that he has confused the elements of a business arrangement, restrictive upon him, with practices condemned by the antitrust laws. McMullin repeatedly accuses American of 'monopolizing his business'. In a sense, that accusation might be true, in that there is 'monopolization' in every form of ownership. The record shows that with a capital investment of $10,000, McMullin took the reins of an operation in which American had invested over $900,000. It would be inconceivable in such circumstances that American would not retain a substantial interest in and control over the business. McMullin's antitrust allegations must, therefore, be considered against this background." (508 F.2d at 1350)

Respondent submits that the District Court correctly perceived the economic realities of plaintiff's business arrangement with defendant. Plaintiff has not disputed the facts of this case, and it is clear that the lower courts have correctly applied the law to such facts.

3. The present controversy does not involve issues of public importance warranting the grant of a Writ of Certiorari.

The issues involved in the present litigation have been rendered moot by the consent decree filed on May 2, 1973 and entered on September 10, 1973 by the United States District Court for the Northern District of Ohio in Civil Action No. C70-895, reported at No. 74,475, 1973 Trade Cases. Pursuant to such decree, defendant, a subsidiary of The Standard Oil Company (Ohio) has discontinued use of commission manager agreements.* The agreements form-

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*The provisions of the consent decree, moreover, permit defendant to set prices at employee operated stations where the employee is compensated in whole or in part on the basis of commission.

ing the basis for plaintiff's claims in this action are no longer in use. Petitioner's arguments in support of his application for review of the controversy by this Court, therefore, do not satisfy the criteria established by this Court in Rule 19 of the REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES. In the words of Chief Justice Taft in *Layne & Bowler Corp. vs. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923):

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Respondent submits that petitioner has not met the burden of Rule 19 and the practice established by this Court in cases such as *Rice vs. Sioux City Cemetery*, 349 U.S. 70 (1954) and *N.L.R.B. vs Pittsburgh Steamship Co.*, 340 U.S. 498 (1950). The arguments advanced on pages 14 through 16 of the petition filed in this Court are in no way supported by the record in this case. Petitioner on page 14 refers to a "list of oil companies adopting commission manager plans" but fails to cite any authority for the statements made in connection therewith. Defendant is unaware of any other oil company using commission manager agreements like those involved in the present litigation, and the record in this case is silent regarding petitioner's assertions of vertical integration by major oil companies. The predictions of the unidentified "experts" cited on page 15 of the Petition that large numbers of gasoline station dealers are being replaced by company dominated operations are also not consistent with the fact. According to the study published by the American Petroleum Institute in August 30, 1974, only 3.5 percent or 7,375 of the nation's estimated 212,000 gasoline service stations in 1974 were directly operated by oil companies, and this percentage represented a decline from 1972.

It must be emphasized, moreover, that although petitioner now bases his arguments on the market place effect of defendant's commission manager agreements with plaintiff, such arguments were not made to the District Court and should not now be considered by this Honorable Court. *Tacon vs. Arizona*, 410 U.S. 351 (1973). In effect, petitioner's posture before this Court consists of unsupported allegations concerning the importance of independent retail marketers with nothing in the record as to the status of independent dealers and without establishing that plaintiff himself was an independent dealer.

CONCLUSION

The decision of the District Court and the Court of Appeals for the Third Circuit in the present case is consistent with the facts on the record and is consistent with the decisions of the Tenth Circuit in *American Oil Co. vs. McMullin*, supra, and the Ninth Circuit in *Gray vs. Shell Oil Co.*, supra, and has been rendered moot by the consent judgment entered against defendant's parent.

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIORARI DENIED